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No. 93-169

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

ROY B. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is barred from seeking injunctive relief requiring petitioner to restore wetlands he illegally dredged, because the United States did not bring a counterclaim seeking such relief in petitioner's previous, unsuccessful suit seeking a declaratory judgment that he dredged the wetlands legally.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the judgment is noted at 990 F.2d 1252 (Table). The order of the district court (Pet. App. 3a-5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1993. A petition for rehearing was denied on May 4, 1993. Pet. App. 23a-24a. The petition for a writ of certiorari was filed on August 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a marine salvage and repair facility in Dickinson Bayou, near Galveston, Texas. On December 6, 1976, he applied to the United States Army Corps of Engineers for a dredge and fill permit pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, and Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. 1344. On March 9, 1977, the Corps issued Department of the Army Permit No. 11706 to petitioner authorizing him to dredge a barge slip and channel and construct a steel pile bulkhead and backfill at his facility in Dickinson Bayou. Pet. App. 8a-9a. The permit contained a condition that "any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit." *Id.* at 9a (emphasis omitted).

2. In 1978 and 1979, investigators for the Corps found that petitioner's dredging operations had exceeded his permit authority. Pet. App. 17a. After petitioner's application for an after-the-fact amendment of his original permit was deemed withdrawn for failure to respond to the conservation concerns of federal and state agencies, the Corps ordered petitioner to restore the unauthorized excavation to its pre-project condition. Gov't C.A. Br. 14-15.

3. On February 13, 1980, the State instituted an enforcement action against petitioner in state court, alleging that petitioner had constructed his facility in violation of state law because he had not received state authorization for it. Pet. App. 12a. The State sought, *inter alia*, an injunction requiring petitioner

to restore the wetlands area he had illegally dredged. Gov't C.A. Br. 4.

On January 23, 1984, petitioner filed a suit in district court against the United States and the State, seeking, *inter alia*, a declaratory judgment that he had not violated his permit and asking that the Corps be directed to issue him a permit for maintenance dredging of Dickinson Bayou. Pet. App. 8a, 12a-13a. Petitioner also removed the state action to federal district court, where it was consolidated with petitioner's declaratory judgment action. *Id.* at 13a.

The United States and the State both filed motions under Fed. R. Civ. P. 12(b) to dismiss and/or for summary judgment. Although the State filed an answer, the United States did not. On June 4, 1985, the district court remanded the state action to state court on the ground that the removal was improper and granted the State's motion to dismiss it as defendant in petitioner's declaratory judgment action. Pet. App. 12a-14a. The court held, however, that it had jurisdiction over petitioner's action against the United States and that the action was not precluded for lack of final agency action or failure to exhaust administrative remedies. *Id.* at 14a-15a.

On March 25, 1986, the district court issued findings of fact and conclusions of law holding that Robinson had violated his permit by dredging in a "no spoil" area consisting of navigable waters and wetlands. Pet. App. 10a. The court held that the language of the permit stating that any activity not specifically identified and authorized shall constitute a violation "means what it says." *Ibid.* The court rejected petitioner's argument that the Corps was precluded from enforcing the terms of the permit by reason of estoppel and laches. *Id.* at 10a-11a. The

court thereupon issued a judgment dismissing petitioner's action. *Id.* at 7a.

4. In 1989, petitioner and the State settled the state court action without addressing the restoration issue. When the Corps learned of the settlement, the United States filed this action, seeking to enjoin petitioner from performing any work or depositing any discharge in navigable waters or wetlands without Corps authorization and to require petitioner to restore the wetlands that had been unlawfully dredged. Gov't C.A. Br. 17-18. Petitioner advanced a number of defenses, including the claim that Fed. R. Civ. P. 13(a) and principles of res judicata barred the government's claim because of the government's failure to file a counterclaim for injunctive relief in petitioner's earlier declaratory judgment action. The district court rejected petitioner's defenses and issued an injunction requiring petitioner to restore the wetlands area at issue and to take related remedial steps. The court's order warned petitioner that his failure to comply with any of the order's particulars would subject him to contempt. Pet. App. 3a-5a.

5. The court of appeals affirmed in an unpublished order. Pet. App. 1a-2a.

ARGUMENT

Petitioner renews his claim that Fed. R. Civ. P. 13(a) and principles of res judicata preclude the United States from obtaining the injunction it seeks.

1. Fed. R. Civ. P. 13(a) has no application to this case. In petitioner's 1984 action, the government moved pursuant to Fed. R. Civ. P. 12(b) to dismiss for failure to state a claim and on other grounds; the government did not file an answer, nor was it

compelled to. Rule 13(a) provides that a counterclaim must be filed "at the time of serving the pleading."[1] Since the United States served no answer—and thus no "pleading"—on respondent in this case, no occasion for application of Rule 13(a) arose. See, *e.g.*, *Horn & Hardart Co.* v. *National Rail Passenger Corp.*, 843 F.2d 546, 549 (D.C. Cir.), cert. denied, 488 U.S. 849 (1988);[2] *United States* v. *Snider*, 779 F.2d 1151 (6th Cir. 1985); *Lawhorn* v. *Atlantic Refining Co.*, 299 F.2d 353, 356 (5th Cir. 1962).

Petitioner contends (Pet. 10) that the pretrial order entered in this case pursuant to Fed. R. Civ. P. 16(e) is a "pleading," and that it thus triggered the government's alleged obligation to file a counterclaim. Fed. R. Civ. P. 7(a) (entitled "Pleadings Allowed; Form of Motions") enumerates the pleadings that are

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[1] Rule 13(a) provides in relevant part:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.

[2] Petitioner concedes (Pet. 4) that "[t]here is no conflict between the *decisions* of different circuits" on the issues in this case. He does claim that there is what he terms (*ibid.*) "a conflict in *princip[le]*" between the Fifth Circuit's decision in this case and the district court's decision in *Horn & Hardart Co.* v. *National R.R. Passenger Corp.*, 659 F. Supp. 1258 (D.D.C. 1987), aff'd, 843 F.2d 546 (D.C. Cir.), cert. denied, 488 U.S. 849 (1988). We doubt that there is any such "conflict in principle." Even if there were, however, further review would not be warranted to resolve an apparent disagreement between the decision of the Fifth Circuit in this case and some comments in an opinion of a district court on an issue that was later addressed definitively by the court of appeals when the district court's opinion was appealed.

allowed in a civil action. It does not include a pretrial order among the pleadings that are allowed, and it expressly provides that, aside from the enumerated pleadings, "[n]o other pleading shall be allowed." Accordingly, the pretrial order was not a "pleading" and did not trigger any alleged obligation of the government to file a counterclaim.

Petitioner cites *Syrie* v. *Knoll Int'l*, 748 F.2d 304, 308 (5th Cir. 1984), and *In-Sink-Erator Mfg. Co.* v. *Waste King Corp.*, 346 F.2d 248, 251 (7th Cir.), cert. denied, 382 U.S. 835 (1965), for the proposition that a pretrial order is a pleading. Pet. 10. In *Knoll*, however, the court merely held that the terms of a pretrial order may amend a pleading previously filed, a result that is plainly contemplated by Rule 16(e)'s provision that a pretrial order "shall control the subsequent course of the action." 748 F.2d at 308. The court did not hold that a pretrial order is itself a pleading and did not have occasion to address any question concerning the application of Rule 13(a). Similarly, in *In-Sink-Erator*, the defendant filed responsive pleadings, including a counterclaim, under Rule 7(a), see 346 F.2d at 249, and the issue before the court concerned the effect of the pretrial order on those pleadings. The court noted that the parties conceded that "a pretrial conference order constitutes a pleading *insofar as it establishes, enlarges, or limits the issues of fact or of law in the case.*" *Id.* at 251 (emphasis added). That appears to be equivalent to the holding in *Knoll* and, as in *Knoll*, does not address the question whether a pretrial order constitutes a pleading for purposes of Rule 13(a).

2. In any event, Rule 13(a) does not by itself provide for the consequences of a failure by a defendant to interpose a compulsory counterclaim.

Petitioner therefore relies on principles of claim preclusion, or res judicata, to argue that the alleged failure of the United States to seek injunctive relief against petitioner in petitioner's prior declaratory judgment action precludes the claim asserted by the United States in this case.

Principles of claim preclusion, however, do not apply with full force to declaratory judgment actions. As petitioner acknowledges (Pet. 7-8), the Declaratory Judgment Act itself suggests that result, since it provides that "[f]urther necessary or proper relief based on a declaratory judgment * * * may be granted * * * against any adverse party whose rights have been determined by such judgment." 28 U.S.C. 2202. The Restatement of Judgments agrees with that principle. The Restatement rule is that a final judgment in a declaratory judgment action "is conclusive in a subsequent action * * * *as to the matters declared*, and, in accordance with the rules of issue preclusion, as to any issues actually litigated * * * and determined in the action." Restatement (Second) of Judgments § 33 (1982) (emphasis added). The comment to that section explains that "a declaratory action * * * does not have a claim preclusive effect * * * with respect to a counterclaim by a defendant." *Id.* § 33 comment c, at 336. That is because, if declaratory judgments had preclusive effect on counterclaims not actually litigated, "[a]ctions for declaratory relief would rapidly develop into full-scale legal contests, and the option of a preliminary suit limited to a declaration of the rights of the parties would evaporate." *Harborside Refrigerated Services, Inc.* v. *Vogel*, 959 F.2d 368, 373 (2d Cir. 1992); accord *Empire Fire & Marine Ins. Co.* v. *J. Transport, Inc.*, 880 F.2d 1291, 1294-1299 (11th Cir. 1989); *Horn &*

Hardart Co. v. *National Rail Passenger Corp.*, 843 F.2d at 549.

Petitioner contends that the Restatement rule does not apply to this case because in his prior action he sought not only a declaration that his dredging comported with his permit, but also an injunction that the Corps issue him a maintenance dredging permit. That request for an injunction, however, did not change the character of petitioner's suit, since petitioner's injunctive claim was entirely dependant on his claim that he was not in violation of his permit; once the district court determined that he was in violation of the permit and that he was therefore not entitled to the declaration he sought, no further issue was presented by his request for a maintenance permit.

To treat petitioner's claim for a maintenance permit as transforming the res judicata effect of his prior action would permit a party in petitioner's position—a potential defendant in an enforcement action—to dictate how the government exercises its enforcement discretion. Cf. *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985); *City of Seabrook* v. *Costle*, 659 F.2d 1371, 1374-1375 (5th Cir. 1981); *Harmon Cove Condominium Ass'n* v. *Marsh*, 815 F.2d 949, 951-953 (3d Cir. 1987) (holding that the United States has prosecutorial discretion under the 1899 Rivers and Harbors Appropriation Act).[3] Any such party could

[3] It is established that persons fearing a future enforcement action may not bring actions under the limited waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. 702, to preempt a feared enforcement action, because until the agency actually institutes an enforcement proceeding, there is no final agency action for the court to review. *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 238, 241-244 (1980).

simply bring a declaratory judgment action against the government and include a claim for relief that would be appropriate only if that party obtains the requested declaration. Under those circumstances, if petitioner's theory were correct, the government would lose any opportunity to exercise its enforcement discretion; by failing to file its enforcement action as a counterclaim, the government would permanently lose its ability to enforce the legal obligation at issue.

3. Finally, principles of res judicata also do not bar a claim where "it is the sense of the scheme that the [defendant] should be permitted to split his [counter]-claim." Restatement (Second) of Judgments, *supra*, § 26(d). In light of the constitutional interests underlying the right of the Executive Branch to determine the necessity for and timing of enforcement actions, see, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. at 832, it is plainly "the sense of the scheme" that a plaintiff's decision to institute a declaratory judgment action does not bar a later government enforcement action. Compare Restatement (Second) of Judgments, *supra*, § 26(f) (no bar where "[i]t is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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